

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1550

74-1550

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1550

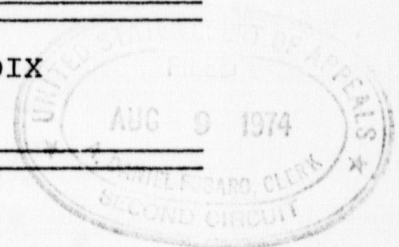
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CARMINE TRAMUNTI, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

253
DEFENDANTS-APPELLANTS' JOINT APPENDIX
Vol. T(40) - Pages 5423 to 5503

HERBERT SIEGAL
Attorney for Defendant-Appellant
Carmine Tramunti
17 John Street
New York, New York 10038
RE 2-5330

NANCY ROSNER
Attorney for Defendant-Appellant
Louis Inglese
401 Broadway
New York, New York 10013
925-8844



31

PAGINATION AS IN ORIGINAL COPY

IVAN S. FISHER
Attorney for Defendant-Appellant
Donato Christiano
401 Broadway
New York, New York 10013
925-5937

ROBERT L. ELLIS
Attorney for Defendant-Appellant
Angelo Mamone
17 East 63rd Street
New York, New York 10021
838-2323

FRANK A. LOPEZ
Attorney for Defendant-Appellant
Joseph DiNapoli
31 Smith Street
Brooklyn, New York 11201
237-9500

THEODORE ROSENBERG
Attorney for Defendant-Appellant
Frank Pugliese
31 Smith Street
Brooklyn, New York 11201
858-0589

KENNETH E. WARNER
Attorney for Defendant-Appellant
Joseph Cerialle
875 Avenue of the Americas
New York, New York 10001
244-4444

ROBERT FISKE
Attorney for Defendant-Appellant
John Gamba
One Chase Manhattan Plaza
New York, New York 10005
422-3400

GEORGE DAVID ROSENBAUM
Attorney for Defendant-Appellant
Vincent D'Amico
51 Chambers Street
New York, New York 10007
BE 3-8120

MICHAEL C. DOWD
Attorney for Defendant-Appellant
Frank Russo
120-10 Queens Boulevard
Kew Gardens, New York 11415
793-2900

ROBERT LEIGHTON
Attorney for Defendant-Appellant
Warren C. Robinson
15 Park Row
New York, New York 10038
267-6016

GARY SUNDEN
Attorney for Defendant-Appellant
William Alonzo
401 Broadway
New York, New York 10013
925-4848

EDWARD PANZER
Attorney for Defendant-Appellant
Hattie Ware
299 Broadway
New York, New York 10007
349-6128

MARTIN JAY SIEGAL
Attorney for Defendant-Appellant
John Springer
250 West 57th Street
New York, New York 10019
586-1414

HARRY POLLAK
Attorney for Defendant-Appellant
Henry Salley
299 Broadway
New York, New York 10007
BE 3-0386

1 tpl

2 UNITED STATES OF AMERICA

 vs.

73 Cr. 1099

3 CARMINE TRAMUNTI, et al.

4

5

New York, March 11, 1974.

6

Trial resumed.

7

- -

8

9

 (At 10.00 o'clock A.M., the jury assembled in
10 the juryroom to continue to deliberate upon a
11 verdict.)

12

13

 (At 10.40 o'clock P.M. in open court, in the
 absence of the jury.)

14

15

16

 THE CLERK: May I have your attention, please.
 Please answer to your attendance when your name
 is called.

17

 Herbert Siegal?

18

 MR. SIEGAL: Here.

19

 THE CLERK: Gilbert Epstein?

20

 MR. EPSTEIN: Here.

21

 THE CLERK: Nancy Rosner?

22

 MRS. ROSNER: Here.

23

 THE CLERK: Frank A. Lopez?

24

 MR. LOPEZ: Present.

25

 THE CLERK: David Rosenbaum?

tp2

1
2 MR. ROSENBAUM: Present.
3 THE CLERK: Gary Sunden? Gary Sunden?
4 Ivan Fisher?
5 MR. FISHER: Here.
6 THE CLERK: Robert L. Ellis?
7 MR. ELLIS: Here.
8 THE CLERK: Theodore Rosenberg?
9 MR. LOPEZ: I am covering for him.
10 THE CLERK: Kenneth Warner?
11 MR. WARNER: Present.
12 THE CLERK: Murray Richman?
13 MR. WARNER: I will cover for Mr. Richman.
14 THE CLERK: Michael G. Dowd?
15 MR. DOWD: Here.
16 THE CLERK: Robert Leighton?
17 MR. LEIGHTON: Here.
18 THE CLERK: Edward Panzer?
19 MR. PANZER: Present.
20 THE CLERK: Martin J. Siegel?
21 MR. SIEGEL: Present.
22 THE CLERK: Harry Pollak?
23 MR. POLLAK: Here.
24 THE CLERK: H. Leonard King?
25 MR. KING: Present.

1 tp3

2 MR. PHILLIPS: Will you have the roll call of
3 the defendants, please?

4 THE CLERK: Carmine Tramunti?

5 DEFENDANT TRAMUNTI: Here.

6 THE CLERK: Louis Inglese?

7 DEFENDANT INGLESE: Here.

8 THE CLERK: Joseph Di Napoli?

9 DEFENDANT DI NAPOLI: Present.

10 THE CLERK: Vincent D'Amico?

11 DEFENDANT D'AMICO: Here.

12 THE CLERK: William Alonzo?

13 DEFENDANT ALONZO: Here.

14 THE CLERK: Donato Christiano?

15 DEFENDANT CHRISTIANO: Right here.

16 THE CLERK: Angelo Mamone?

17 DEFENDANT MAMONE: Here.

18 THE CLERK: Frank Pugliese?

19 DEFENDANT PUGLIESE: Here.

20 THE CLERK: Joseph Ceriale?

21 DEFENDANT CERIALE: Here.

22 THE CLERK: Benjamin Tolopka?

23 DEFENDANT TOLOPKA: Present.

24 THE CLERK: Frank Russo?

25 DEFENDANT RUSSO: Here.

1 tp4

2 THE CLERK: Warren C. Robinson?

3 DEFENDANT ROBINSON: Right here.

4 THE CLERK: Hattie Ware?

5 DEFENDANT WARE: Here.

6 THE CLERK: John Springer?

7 DEFENDANT SPRINGER: Here.

8 THE CLERK: Henry Salley?

9 DEFENDANT SALLEY: Present.

10 THE CLERK: John Gamba?

11 DEFENDANT GAMBA: Right here.

12 (At 10.45 o'clock p.m. Mr. Richman noted his
13 appearance on the record.)

14 THE CLERK: Who is covering for Gary Sunden?

15 MR. ROSENBAUM: I will cover for Mr. Sunden.

16 (At 10.50 P.M., in open court, in the absence
17 of the jury.)

18 THE COURT: I asked the clerk to call the roll
19 of attorneys. At 10 or shortly thereafter I received a note
20 and it was advised there were only five attorneys in the
21 room at that time.

22 Those people who did not respond to the call of
23 attorneys, unless they have a very good excuse, are going
24 to be cited for contempt.

25 At the present time I understand we still have

1 tp5

2 some people missing. I believe Mr. Rosenberg is not here.

3 MR. LOPEZ: No, he is not here, your Honor, but
4 I will cover for him if that helps.

5 THE COURT: Let us hear from Mr. Rosenberg's
6 client first.

7 DEFENDANT PUGLIESE: It's all right with me.

8 THE COURT: Is there anybody else missing?
9 Mr. Sunden?

10 MR. ROSENBAUM: I am covering for Mr. Sunden,
11 your Honor.

12 THE COURT: All right. Mr. Sunden's client?

13 DEFENDANT ALONZO: It's all right.

14 THE COURT: Is it all right with you, sir?

15 DEFENDANT ALONZO: Yes.

16 THE COURT: The note reads, "Judge Duffy:

17 "Will you please define for us the law with
18 regard to 'substantive counts' and the rules of
19 evidence regarding 'hearsay and circumstantial
20 evidence.' Will you kindly give this request
21 first priority."

22 Do you want me to reread it?

23 MR. WARNER: Yes, please.

24 THE COURT: "Judge Duffy:

25 "Will you please define for us the law with

1 tp6

2 regard to 'substantive counts' and the rules of
3 evidence regarding 'hearsat and circumstantial
4 evidence.' Will you kindly give this request
5 first priority."

6 Yes, Mr. Fisher?

7 MR. FISHER: If your Honor please, I think hearsay
8 is only admissible in this case on the conspiracy count.
9 I think the jury should be so advised that they may consider
10 no hearsay with regard to the substantive counts.

11 I think those portions of your Honor's charge
12 where you defined the elements necessary for conviction on
13 the substantive count is sufficient to answer part one,
14 and with regard to the circumstantial evidence, I think that
15 is a clearly defined and articulable aspect of your charge,
16 which isn't too long.

17 MR. PHILLIPS: Your Honor, with respect to cir-
18 cumstantial evidence, your Honor charged them and I think
19 that the charge regarding circumstantial evidence can be
20 read back to them.

21 With respect to hearsay evidence, I think that
22 is a little more difficult problem, because I don't think
23 your Honor went into the law on hearsay in your charge,
24 which is, of course not unusual, and I think -- and I
25 disagree with Mr. Fisher -- I first of all don't think your

1 tp7

2 Honor should charge on hearsay except what is contained in
3 your original charge to the jury and I disagree with Mr.
4 Fisher and that I think whatever hearsay evidence was
5 admitted can be used on both the conspiracy and the sub-
6 stantive counts.

7 THE COURT: You rely upon United States v.
8 Pinkerton as the progeny for that, is that correct?

9 MR. FISHER: I didn't hear what you said.

10 THE COURT: Wait a second.

11 MR. PHILLIPS: We are not relying on United States
12 v. Pinkerton, because I don't think your Honor charged under
13 the Pinkerton theory, your Honor charged the aiding and
14 abetting theory with respect to the substantive counts,
15 but there was hearsay evidence that was admitted, there
16 was much hearsay evidence that was admitted not subject to
17 objection and was admitted on both conspiracy as well as
18 the substantive counts.

19 THE COURT: All right, Mr. Panzer, you wanted to
20 be heard.

21 MR. PANZER: Your Honor, I think under the
22 existing case law the jury would first have to find there
23 was a conspiracy before they can consider hearsay even
24 as to the conspiracy and as to the substantive counts.
25 There has been no indication as far as I can see that they

1 tp8

2 have made any decision at all.

3 I agree with Mr. Phillips, your Honor did not
4 charge the Pinkerton doctrine and I think we are limited.
5 Hearsay would not apply to substantive counts if that were
6 the case.

7 THE COURT: All right. Mr. Curran?

8 MR.CURRAN: Your Honor, I think it is well
9 established -- I can't cite you a case offhand, but I am
10 sure I can find one in a couple of minutes -- it is well
11 established it doesn't make any difference whether there
12 is a conspiracy count in an indictment or not, if the charge
13 in a substantive count involves a joint venture and the
14 proof is showing someone is acting for someone else, so-
15 called hearsay evidence is not really hearsay, it is an
16 exception to the hearsay rule and is admissible to prove
17 the substantive charges.

18 I submit, your Honor, even if there were no
19 conspiracy charge in the indictment in connection with,
20 for example, Count 21, about which the jury inquired yester-
21 day, the evidence of Dilacio's statements with respect to
22 the heroin involved in that count would be admissible
23 against the co-defendant Di Napoli if there were a tie-in
24 of Di Napoli to a narcotics transaction at this period of
25 time.

1 tp9

2 The fact of a conspiracy count in an indictment,
3 I don't think there is any magic in that. I think the
4 same proof where you are talking about aiding and abetting
5 and joint venture is admissible in substantive counts.

6 THE COURT: I am just wondering, the charge
7 covered both direct and circumstantial evidence and they
8 have quoted hearsay and circumstantial. I wonder if they
9 are talking about direct and circumstantial. That is a
10 possibility.

11 MRS. ROSNER: Your Honor, I would only add a few
12 brief comments. I hope they are not repetitive.

13 The jury was not initially charged under the
14 Pinkerton theory, although they might appropriately have
15 been charged in the beginning.

16 In that posture, I think it would be impermissible
17 for evidence admissible under the conspiracy count but not
18 otherwise admissible under any of the substantive counts
19 to be used by the jury in their deliberation on the sub-
20 stantive counts. I would suggest, your Honor, that the
21 jury be instructed that in their consideration of the
22 substantive counts, as to any named defendant, they are
23 limited to the acts and statements of that defendant in
24 determining whether he is guilty beyond a reasonable doubt
25 and that they are to disregard any hearsay by any other

1 tp10

2 alleged co-conspirator in their determination of that count.

3 I think that is the simplest and most straight-
4 forward way, your Honor, of answering the problem.

5 MR. PHILLIPS: What Mrs. Rosner is asking your
6 Honor to do is now to strike testimony that was introduced
7 on various counts, and I don't think that is permissible to
8 strike testimony as a response to a juror's request to hear
9 the law or your Honor's charge with respect to certain
10 elements of the law.

11 MR. LOPEZ: I think that the jury may be referring
12 to Count 21, which is the Di Napoli count, which is based
13 strictly on hearsay evidence.

14 I want to make sure that the record indicates
15 that I join in Mr. Fisher's and Mrs. Rosner's position in
16 that connection.

17 THE COURT: Yes, Mr. Panzer?

18 MR. PANZER: Your Honor, on Mr. Curran's argument,
19 hearsay might be admissible if you establish there is an
20 agency theory, but the only way you can establish that there
21 was an agency theory on the substantive count would be by
22 the acts of the particular principal, therefore, hearsay
23 in and of itself could not establish the essential elements
24 as to that substantive count and I don't think there is
25 anything in the record with respect to Count 21 other than

1 tp11

2 hearsay.

3 THE COURT: All right. I will tell you what I
4 am going to do:

5 Mr. Curran said he could get me a couple of
6 cases in a short time. I would assume that you gentlemen
7 know where the Court of Appeals Library is. I will give
8 you half an hour. If anybody is going to come up with
9 some law, come up with it in a half-hour. All right?

10 (Recess.)

11 (At 11.40 a.m., in open court, in the absence
12 of the jury.)

13 MR. LOPEZ: Judge Duffy, may I make a request?

14 In view of the fact that we are considering this
15 last note from the jury which present intricate legal problems,
16 I suggest it would be in order that we send the note back
17 to the jury indicating to them to specify what count they
18 are considering at this time so that at least we know their
19 thoughts on the matter.

20 THE COURT: No, I don't think we ought to do that
21 right now. Let us do it this way.

22 Of course, it would be of interest to a particular
23 defendant which count is being considered, but I don't think
24 we ought to get into it right now.

25 I suggest, as I indicated in the robing room,

1 tpl2

2 we will read the direct and circumstantial evidence by the
3 Judge and the requirements of the substantive counts, and
4 we will ask them if there is something specific that they
5 want, please tell me about it and we will go on from there.

6 I am telling you, I am sure you recognize getting
7 up a charge on hearsay at this point is going to be no
8 simple task and one I am not going to attempt to toss off
9 the top of my head.

10 MR. LOPEZ: I agree with your Honor. But I want
11 the record to note in view of the fact that the jury is
12 specifically mentioning the legal term "hearsay" and
13 apparently yesterday they heard testimony on Count 21,
14 which is a fully hearsay count or hearsay evidence under
15 that count, I feel it would be appropriate at this time
16 that we give consideration to this matter and that we do
17 give them a charge on hearsay as it applies to the sub-
18 stantive Count 21. That is my request, your Honor.

19 THE COURT: All right.

20 MRS. ROSNER: Your Honor, I think the jury must
21 be told that they are being instructed from your Honor's
22 original charge of the subject matter of the elements of
23 the offense and the difference between direct and circum-
24 stantial evidence and I think they must be told the charge
25 is not being read in response to the hearsay, because

1 tpl3

2 they might think what is being read covers what is entirely
3 in the note and they may be misled.

4 THE COURT: I said that is what I am going to
5 do.

6 MR. PANZER: Your Honor, I just want to put
7 on the record I will be absent. I have a medical appoint-
8 ment. I conferred with my client. She agrees. Mr.
9 Leighton will cover for me.

10 MR. LEIGHTON: I will, your Honor.

11 THE COURT: Will your client stand up, Mr.
12 Panzer?

13 Mrs. Ware, you have heard the statement of your
14 attorney. Do you consent to having Mr. Leighton cover for
15 Mr. Panzer?

16 DEFENDANT WARE: Yes.

17 MR. PANZER: Thank you.

18 (Jury present.)

19 THE COURT: Good morning, ladies and gentlemen.

20 THE FORELADY: Good morning.

21 THE COURT: I received a note from you earlier
22 this morning. The note reads:

23 "Will you please define for us the law with
24 regard to substantive counts and the rules of
25 evidence regarding," and this is in the quote,

1 tpl4

2 "'hearsay and circumstantial evidence.' Will you
3 kindly this request first priority."

4 Needless to say, I have.

5 I believe that what you meant when you said
6 hearsay and circumstantial evidence was direct and circum-
7 stantial evidence, which is part of the charge.

8 I am going to have that read. I am also going
9 to have read the law regarding the substantive counts.

10 If you specifically want a charge in connection
11 with hearsay after you hear this, I want you to go back in,
12 write me a note saying that you specifically want it. All
13 right?

14 Okay, Mr. Court Reporter, would you be good
15 enough to read the part first on direct and circumstantial
16 evidence and then go on to the requirements as to the sub-
17 stantive counts.

18 (Page 5163, line 23, to page 5165, line 15;
19 page 5196, line 14, to page 5199, line 12, read
20 to the jury.)

21 MR. FISHER: Your Honor, excuse me, may we
22 approach the side bar?

23 (At the side bar.)

24 THE COURT: I assume you want to stop reading
25 the other counts?

1 tpl5

2 MRS. ROSNER: Absolutely. Just indicate.

3 THE COURT: All right.

4 MR. CURRAN: No objection.

5 MRS. ROSNER: In addition, your Honor, in
6 the circumstantial evidence charge, the reporter didn't
7 read the part about if an inference is favorable to the
8 defendant it must be drawn. That was part of your Honor's
9 circumstantial evidence charge.

10 MR. CURRAN: It was covered.

11 MR. PHILLIPS: I don't think it was.

12 THE COURT: I think I have covered it.

13 MR. LOPEZ: They omitted that, your Honor.

14 MRS. ROSNER: They omitted the part if there were
15 two inferences and one is favorable to the defendant, you
16 must draw the --

17 MR. CURRAN: You gave a definition of both and
18 that is what you asked for.

19 MR. LOPEZ: You are leaving --

20 THE COURT: All right.

21 (In open court.)

22 THE COURT: Ladies and gentlemen, since you have
23 the indictment inside, we are going to stop reading the
24 counts of the indictment and shorten it.

25 THE FORELADY: Thank you.

1 tpl6

2 (Page 5203, line 24, to page 5209, line 24,
3 and page 5212, line 17, to page 5218, line 11,
4 read to the jury.)

5 THE COURT: All right, ladies and gentlemen,
6 as I said at the outset, if you want something else, just
7 be good enough to send me a note about it.

8 Marshal, will you take the jury out.

9 THE FORELADY: Thank you.

10 (At 12.10 p.m., the jury returned to the
11 juryroom to continue to deliberate upon a verdict.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 tpl

2
3 MR. LOPEZ: Your Honor, with respect to the
4 portion of the charge now recently read, I wish to take an
5 exception on behalf of all the defendants on the Court's
6 failure to charge what was specifically requested by the
7 jury, and that is the definition of hearsay as it applied
8 to the substantive counts and, secondly, your Honor, on
9 behalf of all defendants, I respectfully except to that
10 portion of the charge involving circumstantial evidence
11 and the failure of the Court to give the full charge on
12 circumstantial evidence that it originally gave in its
13 original instruction to the jury, and that is the matter
14 of inferences.

15 MR. DOWD: Your Honor, I think that you in-
16 structed the jury with respect to direct and circumstantial
17 evidence and if there are two inferences that they may draw,
18 then they must draw an inference consistent with innocence,
19 and that throughout what was said, you said, "You may infer,
20 you may infer," which, without that cautionary instruction,
21
22
23
24
25

1 tr 2

2 which was part of the charge, leads the jury necessarily,
3 based on the limited amount that they did hear, to draw
4 the inevitable conclusion to immediately go to the inference
5 that they may infer. It hasn't informed them that they
6 may draw two inferences, they may draw the inference
7 consistent with innocence.

8 I think that is a necessary and it is an integral
9 element of the charge.

10 THE COURT: I assume everybody else joins in the
11 motions, correct, or exceptions? All right. They are
12 denied.

13 I am going out now to find out what arrangements
14 have been made by the marshal for lunch. I will come back
15 and I will tell you where you can't eat. We will go on
16 from there.

17 I don't even know if he made arrangements yet,
18 but I am going to get him to do it and let you know what
19 the story is.

20 (At 12.25 p.m., a note was received from
21 the jury.)

22 THE COURT: As you know, I was going to send
23 the jury to lunch at 12.30 and I asked everybody to remain
24 until 12.30. I gather those who did not are voluntarily
25 absent.

1 tp3

2 I received another note just before the jury went
3 to lunch.

4 "Judge Duffy:

5 "Please explain your charge to us regarding
6 'hearsay evidence,' only hearsay evidence."

7 It is signed Lucy Hare, the Forelady.

8 Mr. Clerk, will you mark this as a Court's exhibit,
9 please.

xx 10 (Court's Exhibit 92 marked for
11 identification.)

12 THE COURT: I permitted you folks to do some
13 research before this morning. Let us have the benefit of
14 it.

15 Mr. Curran?

16 MR. CURRAN: Your Honor, what I think I understand
17 the jury to be referring to if it is an act or a statement
18 made by a co-defendant in connection with either a sub-
19 stantive count or the conspiracy count of the presence of
20 the person about whom the co-defendant is speaking or the co-
21 conspirator is speaking, and it is the government's position,
22 your Honor, that the decision as to the admissibility and,
23 indeed, the competency of the evidence is one to be made
24 by the Court in the first instance and that the jury should
25 consider in determining guilt or innocence on the substantive

1 tp4

2 counts and on the conspiracy count all the evidence that
3 has been received by his Honor and all the evidence that
4 has been put before them.

5 I think you did touch upon that in your charge.

6 We submit in the case United States v. Pugliese,
7 to start off with, at 153 Fed. 2d at page 407, at page 500,
8 that it makes no difference with respect if there is a joint
9 venture being proved whether there is a conspiracy count
10 in the indictment or not.

11 That doctrine was reiterated as recently as, I
12 guess, 1973 in the case United States v. Alsondo, 486 Fed.
13 2d at page 1346, 1347.

14 The other two cases I mentioned to your Honor
15 which I think deal with this point talk about, of course,
16 the Court's charge and the kind of evidence a jury may
17 consider in deciding upon guilt or innocence, and I cite to
18 your Honor United States v. Ragland, 375 Fed. 2d 471. We
19 can hand up a Xerox copy, your Honor, if you wish. We have
20 a Xerox copy of the case.

21 THE COURT: All right.

22 MR. CURRAN: And United States v. Nuccio, 373
23 Fed. 2d 168.

24 I think the point, going to Ragland first, your
25 Honor, is that the Court makes the determination as to what

1 tp5

2 evidence is admissible, so-called hearsay or any other kind
3 of evidence, and once that decision is made by the Court
4 the jury is not given any instruction distinguishing
5 between hearsay, so-called hearsay or non-hearsay evi-
6 dence. That is a matter for the Court in the same manner,
7 really, your Honor, as the Court determines whether a
8 particular defendant has been connected to the conspiracy
9 by a fair preponderance of the evidence as set forth in
10 Geaney, and that the jury is not to get involved in
11 deciding whether evidence is hearsay or non-hearsay in
12 determining guilt or innocence either with respect to a
13 conspiracy count or with respect to a substantive count.

14 In Ragland, your Honor, at the very end of the
15 opinion, at page 479, 375 Fed. 2d at 479, if I could just
16 read here into the record, I would like to.

17 THE COURT: All right.

18 MR. CURRAN: It is paragraph 24. The Court in
19 1967 in this circuit, "In deciding whether to admit hearsay
20 statements made by conspirators against their co-conspirators,
21 we think that the better doctrine is that the Judge is
22 always to decide, as concededly he generally must, any
23 issues of fact on which the competence of evidence depends
24 and that if he decides it to be competent, he is to leave
25 it to the jury to use like any other evidence without

1 tp6

2 instructing them to consider it as proof only after they,
3 too, have decided a preliminary issue which alone makes it
4 competent."

5 That is citing Dennis there, your Honor.

6 The Court went on to say:

7 "The reason for the rule there stated," from
8 Dennis, citing Dennis, "it is difficult to see what
9 value the declarations could have as proof of the
10 conspiracy if before using them the jury had to be
11 satisfied that the declarant and the accused were
12 engaged in the conspiracy charged, for upon that
13 hypothesis the declarations would merely serve to
14 confirm what the jury had already decided."

15 Then it went on to say, skipping paragraph 25,
16 or part of it, your Honor, "Under the rule announced in
17 United States v. Dennis Supra, the learned trial judge
18 after thus determining the admissibility of the statements
19 by the challenged instruction, unnecessarily gave the jury
20 to secondguess his decision."

21 I think, your Honor, in United States v. Nuccio,
22 we have somewhat similar language. Briefly, the Court said
23 at page 173, 373 Fed. 2d 168 at 173:

24 "The established rule in this circuit is that
25 determination of the adequacy of such proof is for

1 tp7

2 the Judge and if he is satisfied on that score he is
3 to leave the declaration to the jury to use like any
4 other evidence without instructing them to consider
5 it as proof only after they, too, have decided a
6 preliminary issue which alone makes it competent,"
7 citing, your Honor, Dennis and Pugliese, which I
8 previously cited, and United States v. Stadter and also
9 United States v. Borrelli.

10 In addition, your Honor, over and above that
11 point where we feel very strongly that questions of defini-
12 tion or decisions as to hearsay should not be given to the
13 jury because it is not within their province as the Second
14 Circuit has made plain, with respect to evidence at least
15 on some of the substantive counts, and specifically we were
16 talking this morning about Count 21 because there was --

17 THE COURT: I don't know what count we are talking
18 about at this point.

19 MR. CURRAN: In a number of situations, your
20 Honor, over and above the point we just made as a matter
21 of law, there was no objection to receipt of declarations
22 of co-conspirators and co-venturers, with respect to Count
23 21 specifically, your Honor, and on Pannirello's testimony
24 there was no objection.

25 I think our main point is as a matter of law,

1 tp8

2 your Honor.

3 MR. SUNDEN: Objection.

4 THE COURT: Wait a second.

5 Mr. Siegal, do you have anything to say in
6 connection with this?

7 MR. SIEGAL: Only that there was an objection
8 to all this hearsay testimony. As a matter of fact,
9 I move to strike out at the end of the case all of the
10 testimony taken subject to connection.

11 THE COURT: All right. Mr. Lopez --

12 MR. LOPEZ: Go to Mr. Fisher.

13 MRS. ROSNER: Taking Mr. Curran's arguments in
14 inverse order, his statement is classic sandbagging. In
15 order to avoid repeated objections, the Court granted to
16 every defense counsel a standing objection to hearsay which
17 was admitted subject to connection on the conspiracy count,
18 including Pannirello and every other witness. So the
19 argument that the record is not protected is simply without
20 merit.

21 Your Honor, with respect to the substance of
22 Mr. Curran's argument, I would analyse the jury's request
23 and make an appropriate answer in the following fashion:

24 Mr. Curran correctly states that under a
25 substantive count hearsay may be admissible when

1 tp9

2 and only when a joint venture has been shown with respect
3 to the conduct under that count between two or more
4 individuals. In other words, hearsay is not automatically
5 admissible.

6 Just as with the conspiracy count itself,
7 hearsay is admissible under a substantive count when and
8 only when a fair preponderance of non-hearsay evidence
9 under the substantive count has been shown. And for that
10 proposition we would rely on United States v. Geaney and
11 United States v. Fantuzzi. Copies of both are in the
12 courtroom for the Court's perusal.

13 MR. LOPEZ: 463 Fed. 2d, your Honor, and that
14 would be at page 683.

15 THE COURT: What is the Geaney cite?

16 MR. LOPEZ: 417, your Honor, Fed. 2d at page
17 1116.

18 MRS. ROSNER: The point is this, your Honor:

19 The jury is very obviously grappling with the
20 question on which substantive counts may hearsay be con-
21 sidered or with respect to any given substantive count what
22 of all the hearsay in the case may be considered, and I
23 don't think even the government would venture to state
24 that hearsay unrelated to a certain count which is ad-
25 missible by virtue of the conspiracy count comes in as

1 tp10

2 evidence under a particular substantive count. There
3 obviously are questions of admissibility with respect to
4 specific substantive counts, and I think your Honor could
5 fairly charge the jury that with regard to a particular
6 substantive count there must be a preponderance of non-
7 hearsay evidence before they may consider the hearsay
8 which might be probative under any given substantive
9 count.

10 If your Honor will give defense counsel a few
11 moments, we would submit to the Court a proposed instruction
12 along those lines.

13 THE COURT: All right.

14 MR. FISHER: If your Honor please, first, I
15 would like to remind the Court that the Court did not
16 charge under the rational of Nuccio, but, rather, instructed
17 the jury in the connected version of your Honor's charge
18 that the jury must first find by a defendant's own acts and
19 declarations joining. I think that is critical.

20 If we were to change that now, your Honor, I
21 think we would have a veritable boondoggle in there and
22 it would be incomprehensible. Conspiracy is difficult
23 enough to understand.

24 Secondly, your Honor, hearsay is generally
25 inadmissible. It is admissible, however, as an exception

1 tpll

2 under a conspiracy count.

3 The cases on which the government primarily relies
4 all discuss conspiracy counts.

5 Therefore, if your Honor please, hearsay with
6 regard to a substantive count is not admissible, except
7 upon the finding of another exception, to-wit, in this case,
8 the government argues, joint venture.

9 If your Honor please, joint venture and con-
10 spiracy are not terribly far apart when we grapple with
11 the question whether or not hearsay is admissible with
12 regard to a substantive count. We rely on United States v.
13 Annunziata, the citation to be supplied by Mr. Lopez --

14 MR. LOPEZ: That is 293 Fed. 2d, your Honor,
15 page 373.

16 MR. FISHER: At headnote 5 of that opinion,
17 your Honor, right at the beginning of headnote 5, the
18 Court takes pains to point out that there must be something
19 besides the hearsay to persuade the trier of facts, at
20 least, that the joint venture, in fact, exists.

21 The joint venture and conspiracy are not co-
22 extensive. Joint venture, in fact, is far more limited.
23 When we are talking about an exception to the hearsay rule
24 under the joint venture rationale, we must limit ourselves
25 to the question with respect to a specific count in the

1 tpl2

2 indictment, was there a joint venture between the declarant
3 and the defendant against whom it is sought to be ad-
4 mitted. And that must be found, I submit, under the
5 rational of Geaney, if your Honor please, by a fair
6 preponderance by your Honor on the basis of non-hearsay
7 testimony.

8 For example, count 21, so far as I know, is
9 completely devoid of any non-hearsay testimony. The
10 reason I mention that as an example is this:

11 Therefore, your Honor, I submit, improper for
12 this Court with regard to Count 21, for instance, to advise
13 the jury that hearsay may be considered on that count. It
14 would be improper for the Court, I submit, most respect-
15 fully, to advise the jury that if they find a joint venture
16 between the declarant and the defendant Di Napoli on Count
17 21 they may consider the hearsay because as a matter of law,
18 if your Honor please, there is no sufficient evidence by
19 which this Court can find by a fair preponderance or by any
20 standard that there was, in fact, a joint venture between
21 the declarant and the defendant Di Napoli.

22 Following that reasoning, your Honor, I think
23 we have to go down count by count to determine whether or
24 not with regard to each count there is sufficient non-
25 hearsay proof in order for the government to meet its

1 tpl3

2 burden by a fairpreponderance of establishing a joint
3 venture. If that is the case, then the government would
4 argue the hearsay would be admissible.

5 MR. LOPEZ: Your Honor, joining co-counsel,
6 I would like to alert the Court to the fact that when the
7 government was asked to supply its pages of proof in the
8 record of this court to substantiate specifically Count 21
9 against Joseph Di Napoli, I submit that it was their
10 suggestion at all times that page 2174 to page 2177 were
11 applicable to the count exclusively.

12 Now I say this to your Honor:

13 Throughout these three pages that we read to
14 the jury, there is nothing but hearsay evidence. here
15 was no non-hearsay evidence in any of these three pages.

16 I, therefore, feel, your Honor, unless, as Mr
17 Fisher has pointed out and Mrs. Rosner has pointed out,
18 that unless the government can show a joint venture, a joint
19 venture in this matter, that the jury should be instructed
20 on the meaning of hearsay and that they cannot apply it,
21 they cannot apply it to the evidence in this case unless
22 they find from the testimony that was read to them, 2174
23 to 2177, that they can find a joint venture.

24 THE COURT: Just hold it.

25 Does anybody else from the defense want to say

1 tpl4

2 anything about this?

3 MR. SUNDEN: I wish to say this, Judge:

4 My client is not charged with a substantive
5 count, so this discussion does not directly pertain to
6 him, but just to be clear on the record, Mr. Curran's
7 final comments about no exceptions to the hearsay state-
8 ments, I would join in co-counsel as to that. I at all
9 times understood your Honor gave us a standing objection
10 and to that extent it does concern my client.

11 THE COURT: All right.

12 MR. PHILLIPS: Your Honor, Mr. Lopez and Mrs.
13 Rosner are asking the Court to do precisely what the Second
14 Circuit has said in both Nuccio and Ragland was not the
15 jury's function to do, and that it is the Court's function
16 to find whether there is a sufficient preponderance of the
17 evidence, which is the standard set forth in Geaney, as to
18 whether or not the hearsay evidence should be admitted,
19 and once the Court makes that determination and finds that
20 there is a sufficient preponderance of evidence, then all
21 the evidence, the hearsay goes in and it can be considered
22 by the jury in its determination of guilt or innocence.

23 With respect to the lack of objection, I would
24 submit, your Honor, that the question is that there was
25 objection as to whether or not the hearsay evidence should

1 tpl5

2 he admitted on the conspiracy charge and the only count
3 in the entire indictment where the issue arises as to the
4 hearsay evidence vis-a-vis the substantive charge is
5 Count 21, because as to every other count in the indictment
6 there was direct evidence as to that particular trans-
7 action.

8 Count 21 is the only count where the transaction
9 involved purely hearsay evidence. And on that particular
10 point, when that evidence came in, which was Harry
11 Pannirello's testimony as to what Pat Dilacio told him,
12 there was no objection whatsoever by Mr. Lopez or any other
13 counsel as to the admissibility of that evidence on the
14 substantive charge, only with respect to the conspiracy
15 charge.

16 Finally, your Honor, I would just like to refer
17 the Court to the Second Circuit's opinion in United States
18 v. Alsondo at 486 Fed. 2d, page 1339, specifically Judge
19 Feinberg's opinion on petition for rehearing at page 1346,
20 where it discusses the question of substantive violations.

21 THE COURT: All right. Go to lunch.

22 MR. FISHER: Can we have a little longer, your
23 Honor?

24 THE COURT: About 10 after.

25 (Luncheon recess.)

- - -

1 tpl

T2 2 (At 2.50 p.m., in open court, in the absence
3 of the jury.)

4 THE COURT: We have received another note from
5 the jury.

6 Mr. Clerk, will you mark this as Court's
7 Exhibit 93.

xx 8 (Court Exhibit 93 marked for
9 identification.)

10 THE COURT: This one reads:

11 "Judge Duffy:

12 "Please read to us the testimony of Harry
13 Pannirello regarding the drug transaction with a
14 William Alonzo.

15 "Very truly yours,

16 "Lucy Harq Forelady."

17 MR. SUNDEN: Judge, may I have a few moments to --

18 THE COURT: You are going to have more than a
19 few moments. Relax. We still haven't cleaned up the
20 hearsay matter. We had two left over from last night,
21 so I think you will have a few minutes.

22 MR. SUNDEN: Very good.

23 THE COURT: All right, bring in the jury.

24 (Jury present.)

25 THE COURT: Ladies and gentlemen, just before
you left for lunch I received a note which says, "Judge

1 tp2

2 Duffy:

3 "Please explain your charge to us regarding
4 hearsay evidence, only hearsay evidence."

5 Hearsay has been defined as a statement other
6 than one made by the witness while testifying at the trial
7 or hearing offered in evidence to prove the truth of the
8 matter asserted.

9 Another definition of hearsay might be that
10 hearsay is a statement which was made outside of the
11 presence of the individual against whom it is being offered.
12 The hearsay statement is one which was made out of court
13 and not under oath by a third party who is not a witness
14 before the Court.

15 Your note did not indicate exactly what you
16 wanted to know about hearsay, but you will remember that I
17 told you during my charge on the conspiracy count you had
18 to consider each defendant separately, that his participation
19 in the conspiracy, if you find one did exist, must be
20 established by the independent evidence of each defendant's
21 own acts, statements and conduct and the reasonable
22 inferences to be drawn therefrom.

23 To find that a particular defendant was a member,
24 you must be satisfied beyond a reasonable doubt that are
25 of its purposes that particular defendant was a willing

1 tp3

2 participant with the intent to advance its purposes.

3 If you do so find, then however limited his
4 role in the furthering of the objectives of the conspiracy,
5 he is responsible for all that was done in furtherance
6 thereof either before or during its continuance.

7 Once you are satisfied beyond a reasonable
8 doubt that a conspiracy existed and that a particular
9 defendant was a member, then the acts and declarations
10 of any other person you also find was a member of the
11 conspiracy made by such co-conspirators during its existence
12 and in furtherance of its objectives are considered the acts
13 and declarations of all other members of the conspiracy
14 even though they were not present.

15 As to the substantive counts, the rule is some-
16 what similar.

17 If you find that two or more defendants named
18 in a particular count or engaged in a joint undertaking
19 but the purpose of the intent of the two defendants being
20 the same and if you find that one defendant was a partici-
21 pant in the joint undertaking, then the acts and declara-
22 tions of any other person whom you find was also a member
23 of the joint undertaking made in furtherance of the
24 objective of the joint undertaking are considered to be
25 acts and declarations of the other members of that joint

1 tp4

2 undertaking even though they were not present.

3 That concludes my charge to you on hearsay,
4 as I think it covers the matter.

5 I received, however, another note from you
6 requesting that certain testimony be read.

7 You may recall that last night I also received
8 two other notes and I did not have that testimony read back
9 to you. .

10 I would appreciate it if you would retire to the
11 juryroom now, send me note telling me what you want read
12 back and in what order. Last night was Count 14 and
13 Count 28, to the best of my recollection, and you didn't
14 want them read at the same time.

15 This regards the testimony of Pannirello regard-
16 ing a drug transaction with William Alonzo.

17 If you would be good enough to let me know which
18 order you want the three things read in and then advise
19 the marshal when you want them read, you just slip a note
20 to them and say, "We want so-and-so read," it will be
21 done.

22 All right, Mr. Marshal.

23 (At 3.00 p.m., the jury returned to the
24 juryroom to continue to deliberate upon a verdict.)

25 THE COURT: Mr. Sunden, I think it would be

1 tp5

2 easiest if you come into the robing room and maybe we can
3 work out what testimony is to be read on William Alonzo.

4 MR. SUNDEN: Very good. I wonder if I can
5 have a few moments to consult the transcript for maybe
6 five minutes or so?

7 THE COURT: Yes.

8 MR. RICHMAN: Your Honor, did you take care of
9 that evidentiary matter with reference to Tolopka?

10 THE COURT: No. That is one of the things that
11 is still outstanding. They have been hitting me with so
12 many notes I haven't had a chance to do that. That is one
13 of the things.

14 Yes, Mrs. Rosner?

15 MRS. ROSNER: Your Honor, with respect to the
16 charge on hearsay, your Honor, in essence, instructed the
17 jury with respect to substantive count if they found a joint
18 venture, the acts and declarations of each joint venturer
19 were admissible against the others, but you failed to
20 instruct them that they had to find a joint venture by non-
21 hearsay evidence, the result being that they may, under
22 your Honor's instruction, use hearsay to prove the very
23 agency which makes the hearsay admissible.

24 I am almost certain that is the way that the
25 charge was given. If my recollection is not correct,

1 tp6

2 I ask that that charge be read back, because I think it is
3 critical because I think that is the point of the jury
4 note and I think your Honor's instruction as given provides
5 that they can find joint venture by hearsay evidence alone.

6 THE COURT: Yes, Mr. Fisher.

7 MR. FISHER: I think your Honor also incorrectly
8 failed to advise the jury that a declaration made and
9 sought to be admitted against the defendant under a joint
10 venture theory must be found to have been made during the
11 period of the joint venture and in furtherance of the con-
12 spiracy.

13 MR. LOPEZ: Your Honor, all defense counsel --

14 THE COURT: Everybody takes an exception, I
15 assume?

16 MR. LOPEZ: Yes.

17 Just to make one inquiry, is it a fact that the
18 objections that counsel generally made at the inception of
19 the trial and during the early stages of the trial accrue
20 to all the hearsay testimony that was later adduced by the
21 government, including that of Count 21? We were covered
22 on those objections that were made? We didn't want to be
23 repetitive.

24 THE COURT: Mr. Lopez, you recall at the outset
25 of this trial exactly what happened?

1 tp7

2 MR. LOPEZ: Yes, sir.

3 THE COURT: I made it absolutely clear. I asked
4 you not to have the entire phalanx of attorneys jumping up.

5 MR. LOPEZ: Right. Thank you very much, Judge
6 Duffy.

7 THE COURT: Did you object to being included
8 in the phalanx?

9 MR. ELLIS: No, I am starting a new phalanx.

10 Your Honor, we have had a series of questions
11 going to the admissibility of evidence, and I suggest that
12 it might be appropriate at this time or at the next con-
13 venient time to remind the jury that even when evidence is
14 admissible, the weight of that evidence belongs to them,
15 and they ought to consider everything bearing on credibility,
16 and when we say something is admissible we don't mean that
17 that piece of evidence that is introduced is established
18 by any means.

19 THE COURT: All right. Let me think about that.

20 Mr. Sunden, do you figure it will take you five
21 or ten minutes?

22 MR. SUNDEN: Yes.

23 THE COURT: All right, fine. Let me know when
24 you are ready.

25 Mr. Curran --

1 tp8

2 MR. CURRAN: We are ready.

3 THE COURT: I thought you would be. It is 2190
4 through 93 of the direct?

5 MR. CURRAN: Yes, sir.

6 THE COURT: All right.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 tp9

2 (At 3.15 p.m., a note was received from the
3 jury.)

4 (In the robing room.)

5 THE COURT: There was a discussion yesterday
6 as to how much of the Barnaba direct was to go in. Every-
7 body agreed, I think, it started on 1422, line 1. There
8 is a question as to whether it should break at 1425 or
9 1427, line 6.

10 MR. CURRAN: Yes, sir.

11 THE COURT: I believe it proper that 1427,
12 line 6, go in.

13 MR. ELLIS: Judge, I take it I have an excep-
14 tion?

15 THE COURT: Yes, absolutely.

16 (At 3.35 p.m., a note was received from the
17 jury.)

18 (In open court, in the absence of the
19 jury.,

20 THE COURT: I received two notes from the jury.
21 One reads:

22 "Judge Duffy:

23 "Please send us testimony regarding Count 14
24 and Count 28.

25 "Thank you."

1 tpl0

2 That is going to be marked as Court's Exhibit 94
3 for identification.

4 The second note reads:

5 "Judge, we are now," underlined "now,"
6 "ready to hear the testimony regarding Count 14."

7 I have ruled on the testimony that is to come
8 in in the robing room.

9 Mr. Clerk, bring in the jury and we will have it
10 read to them.

11 MRS. ROSNER: Your Honor, that is the 1422
12 sequence?

13 THE COURT: Yes.

14 (Court Exhibit 94 and 95, respectively, marked
15 for identification.)

16 (Jury present.)

17 THE COURT: Ladies and gentlemen, you asked for
18 the testimony concerning Count 14 to be read to you. The
19 court reporter is going to do that now.

20 (Page 1422, line 1, to page 1427, line 6,
21 read to the jury.)

22 (Page 1681, lines 1 to 15, read to the
23 jury.)

24 THE COURT: All right, Mr. Marshal and ladies
25 and gentlemen, you may leave.

1 tpll

2 (At 3.45 p.m., the jury returned to the jury-
3 room to continue to deliberate upon a verdict.)

4 (At 3.50 p.m., a note was received from the
5 jury.)

6 THE COURT: Mr. Curran, you said you had an
7 exhibit on Mr. Tolopka. I can't find it.

8 MR. CURRAN: Yes, your Honor. I believe there
9 are two. One is Government's Exhibit 103 in evidence,
10 which consists of the Yonkers Raceway employees' work record
11 documents introduced through Mr. Malerba, who was a defense
12 witness. I hand that up to your Honor.

13 The other consists of -- these are defendant
14 exhibits, but I was using them on cross and I had them,
15 your Honor. It is Defendant's Exhibit I, it is two memo
16 books, and my recollection is -- I think Mr. Richman would
17 agree -- they were only admitted as to the months of
18 August and October of 1970, and there are entries for
19 various days and gaps for other days.

20 THE COURT: Do you want to break them up?

21 MR. RICHMAN: I have no objection, unless you
22 want to put the whole thing in for whatever purpose it is
23 worth.

24 MR. CURRAN: I think it should just go in
25 for those months, your Honor.

1 tpl2

2 MR. RICHMAN: Why don't we put a rubber band
3 around the other part and indicate that --

4 THE COURT: I don't care. You can work it out
5 among yourselves.

6 MR. CURRAN: Mr. Richman and I, I am sure,
7 if we can get together for a few minutes, can submit them
8 to you with agreement.

9 THE COURT: All right. I know Mr. Sunden
10 stepped out. He apparently lost his briefcase. He
11 wanted to run down -- here he is.

12 MR. ELLIS: I think I can get Rosner and Fisher.

13 THE COURT: All right.

14 I would like to turn these exhibits over as fast
15 as possible since they did request them.

16 I will tell you what I will do, I will just men-
17 tion to the jury when they come out that I am going to give
18 them to the marshal and he will deliver them through the
19 door to them.

20 MR. RICHMAN: Very well.

21 MR. CURRAN: By that time we will be ready.

22 THE COURT: All right.

23 All right, bring back the jury.

24 MR. CURRAN: Your Honor, before the jury returns,
25 I'm not sure that all the lawyers are here or covered if

1 tpl3

2 they are not here.

3 MR. SIEGEL: Your Honor, I am covering for Mr.
4 King and Mr. Pollak.

5 THE COURT: All right. Is Mr. King's client
6 here?

7 DEFENDANT GAMBA: Yes.

8 THE COURT: Do you agree, Mr. Gamba?

9 DEFENDANT GAMBA: Yes.

10 THE COURT: Mr. Salley, do you agree?

11 DEFENDANT SALLEY: Yes, Judge, I do.

12 MRS. ROSNER: Your Honor, may I know what the
13 jury is going to be read now?

14 THE COURT: Yes. This is the testimony on
15 Count 28 which was agreed to in the robing room last night.

16 MRS. ROSNER: That is what I wanted to know,
17 Judge.

18 THE COURT: All right. It is pages 399, line
19 18, to 402, line 8, and 696, line 5, to 697, line 21.

20 MRS. ROSNER: Thank you, Judge.

21 (Jury present.)

22 MR. PHILLIPS: Your Honor, may we just approach
23 the side bar briefly?

24 THE COURT: Yes.

25 (At the side bar.)

1 . pl4

2 THE COURT: Did I miss something?

3 MR. PHILLIPS: I think line 18 reads, "Did
4 Lentini mention after you got out on bail," and obviously
5 the meaning is, "Did Moe Lentini mention when he got out on
6 bail."

7 THE COURT: Do you agree?

8 MRS. ROSNER: Yes, I do agree.

9 THE COURT: All right. What page is that?

10 MR. PHILLIPS: That is on page 399, line 18,
11 the first line.

12 (In open court.)

13 THE COURT: I received a note which is going to
14 be Court's Exhibit 96, which reads: "We are now ready for
15 testimony regarding Count 28."

16 All right, Mr. Reporter, would you read that,
17 please.

18 (Page 399, line 18, to page 402, line 8, was
19 read to the jury.)

20 (Page 696, line 5, to page 697, line 21, was
21 read to the jury.)

22 THE COURT: All right, ladies and gentlemen,
23 the last evening you also requested to see the various
24 exhibits, including the tax returns and so on for the
25 defendant Tolopka. I am going to have the marshal deliver

1 p15

2 those through the door to you.

3 All right, Mr. Marshal, take the jury out,
4 please.

5 (At 4.05 p.m., the jury returned to the jury-
6 room to continue to deliberate upon a verdict.)

7 THE COURT: I have another note.

8 "We would like to hear the summation remarks
9 of, A, the defense attorney and, B, the prosecuting
10 attorney regarding Count 21."

11 After you figure it out, come into the robing
12 room.

13 (Court Exhibit 97 marked for identi-
14 fication.)

15 (At 4.15 p.m., a note was received from the
16 jury.)

17 (In the robing room.)

18 MR. SENDEN: Briefly stated, Judge, my position
19 as to these suggested lines, 2456, line 22, through 2458,
20 line 14, is this:

21 While certainly I guess I agree I would abide
22 by your Honor's ruling as to general credibility such as
23 the fact that a man might have charge pending against him
24 and I guess that would be something that should not
25 necessarily be rehashed, these questions are preliminary

1 pl6

2 to my questions which later on ask, "Didn't you, in fact,
3 say that there was a dry spell from February to March,
4 '72?"

5 If that is believed by the jury, that is not a
6 general reason to disbelieve this man, that is a direct
7 conflict with his direct testimony wherein he stated he
8 made a sale to Alonzo during February or March of 1972.

9 These questions here, in my cross-examination
10 I didn't proceed by saying, "Isn't it true there was a
11 dry spell and didn't you swear to tell the truth to the
12 agent," I proceeded in my cross-examination by first asking
13 him, "Didn't you swear what you said to the agent was true,
14 and later on I said, "Didn't you say there was a dry spell
15 in February to May?"

16 Part of my whole defense here is that this man
17 made a prior inconsistent statement and in that statement
18 he swore he was telling the truth at the time. To not allow
19 this to come in in cross-examination is really to take away
20 the heart of my defense here.

21 This is not just general credibility because
22 the man has indictments hanging out against him, this is
23 a prior inconsistent statement, the very heart of my
24 defense, particularly in light of your Honor's marshalling
25 of the facts wherein as to my client you stated that the

1 p16

2 to my questions which later on ask, "Didn't you, in fact,
3 say that there was a dry spell from February to March,
4 '72?"

5 If that is believed by the jury, that is not a
6 general reason to disbelieve this man, that is a direct
7 conflict with his direct testimony wherein he stated he
8 made a sale to Alonzo during February or March of 1972.

9 These questions here, in my cross-examination
10 I didn't proceed by saying, "Isn't it true there was a
11 dry spell and didn't you swear to tell the truth to the
12 agent," I proceeded in my cross-examination by first asking
13 him, "Didn't you swear what you said to the agent was true,"
14 and later on I said, "Didn't you say there was a dry spell
15 in February to May?"

16 Part of my whole defense here is that this man
17 made a prior inconsistent statement and in that statement
18 he swore he was telling the truth at the time. To not allow
19 this to come in in cross-examination is really to take away
20 the heart of my defense here.

21 This is not just general credibility because
22 the man has indictments hanging out against him, this is
23 a prior inconsistent statement, the very heart of my
24 defense, particularly in light of your Honor's marshalling
25 of the facts wherein as to my client you stated that the

1 pl7

2 defendants are relying upon the general prior inconsistencies
3 of witnesses and then you did not proceed to -- in marshal-
4 ling the facts you told Pannirello's allegation that he
5 made this transaction with Alonzo, but you did not allude
6 to the fact that Pannirello did come, indeed, make a prior
7 inconsistent statement to a government agent wherein he
8 told the truth.

9 I would submit if your Honor didn't allow this
10 in, really, the heart of my defense would be out. This
11 is not a general credibility question, this is a preliminary
12 question to a direct conflict of testimony here. He
13 couldn't have been telling the truth both times.

14 MR. PHILLIPS: Your Honor, I think, correctly
15 decided when the jury asked a question of Count 21 with
16 respect to Di Napoli that general credibility gone into
17 on cross-examination by Mr. Lopez would not be read to them
18 and I think the same applies here. This goes to general
19 credibility.

20 MR. SUNDEN: I really don't think it is general
21 credibility, your Honor, I think it is as to the specific
22 date involved.

23 THE COURT: I will hold up on this one. I don't
24 see a specific date here.

25 MR. SUNDEN: Judge, what I --

1 :pl8

2 THE COURT: You are not losing yet. Let us
3 go on to the specific date.

4 Where is that?

5 MR. SUNDEN: Do you want me to direct your
6 attention now to the part where he does mention the date,
7 the actual date?

8 THE COURT: No. Here we have 2459, line 10.

9 MR. SUNDEN: In these series of questions I
10 didn't get to the date part yet, this was explaining what
11 the dry spell was --

12 THE COURT: The whole guts of it starts at
13 2460, not before that, "During the course of these inter-
14 views."

15 MR. SUNDEN: That is true, except that I would
16 submit if the jury started at 2460 they might not know what
17 interviews I am referring to. The other questions are
18 preliminary, so that the jury would understand that what
19 interviews I am talking about are the interviews with the
20 government agent, wherein he swore he was going to tell the
21 truth. I think they would be coming in cold and they
22 might not know what interviews I am talking about. That
23 is the reason I asked for those.

24 I want to just change part of that request I
25 made here starting at 2465 and delete on 2466, lines 8

1 .pl9

2 through 15.

3 MR. PHILLIPS: I don't see what this has to do
4 at all with the jury's note and request.

5 Here we are talking about Butch Pugliese going
6 to jail and telephone numbers he gave and so forth.

7 MR. SUNDEN: My position on this would be
8 Panirello's testimony was that Alonzo was a customer and
9 this goes to disabuse that notion.

10 THE COURT: It is my understanding that Alonzo
11 was starting out again.

12 I wouldn't let the government get into the fact,
13 and I don't even think they tried, but I wouldn't let them
14 get into the fact that he was just getting out of jail at
15 that time, but I learned it from some place.

16 MR. SUNDEN: Right.

17 I can see that this part of the testimony might
18 fall into more of a general credibility attack rather than
19 a specific inconsistent statement.

20 THE COURT: Under the circumstances, I am not
21 going to let that in.

22 What is the next one?

23 MR. SUNDEN: The part where we disagree --

24 THE COURT: Let me see what is involved here.

25 (Pause.)

1 .p20

2 MR. PHILLIPS: The government consents to line 9
3 to line 14 on page 2472, that one question and that one
4 answer.

5 MR. SUNDEN: Can I be heard as to that?

6 THE COURT: I will let in up to line 14 on page
7 2472.

8 I don't know what it means.

9 MR. SUNDEN: It refers to the statement he gave
10 the agents seven or eight months ago.

11 MR. PHILLIPS: Are you talking about 2475?

12 MR. SUNDEN: Yes.

13 MR. PHILLIPS: I think this just talks generally.

14 MR. SUNDEN: No. The whole cross-examination
15 is based on the fact he gave a prior inconsistent state-
16 ment to the agent.

17 THE COURT: The request on 2475 is denied.

18 MR. PHILLIPS: I take it your Honor has granted
19 to a certain extent the defendant's request regarding the
20 prior statement on the dry spell?

21 THE COURT: Yes.

22 MR. PHILLIPS: If your Honor does, the govern-
23 ment would then ask that page 2577, lines 2 through 10,
24 be read. That is redirect examination.

25 MR. SUNDEN: Can I just look at that? I don't

1 p21

2 have that.

3 (Pause.)

4 THE COURT: To where?

5 MR. PHILLIPS: Line 19, your Honor, where the
6 witness says, "Yes."

7 MR. SUNDEN: Judge, may I just say, if you were
8 inquiring to grant that for the government, I would ask you
9 to reconsider the request I made at 2475, then, because
10 just as the government's redirect here is an attempt to
11 clarify that, so that question on cross-examination is
12 directly on that point, also. I don't think one should
13 be allowed in without the other.

14 MR. PHILLIPS: This is directed only to clarify
15 the cross-examination that you went into regarding the
16 prior inconsistent statement on the dry spell.

17 MR. SUNDEN: That is what I am saying, that
18 question that your Honor just indicated --

19 THE COURT: What is that?

20 MR. SUNDEN: 2475 to 2476, line 23.

21 That question relates to the very same topic
22 that the redirect is trying to clear up.

23 THE COURT: You mean the one question and one
24 answer?

25 MR. SUNDEN: Yes.

1 p22

2 (Pause.)

3 MR. SUNDEN: Judge, on 2959, I would ask that
4 you would include starting at line 10, because I don't think
5 the question makes sense without that previous question
6 if you just start with line 14 where it says, "What is
7 that?"

8 THE COURT: All right.

9 The first three pages of Section 2456 through
10 2458 will not be read.

11 MR. SUNDEN: I respectfully take exception to
12 that, Judge.

13 THE COURT: Yes, of course. You don't have to.
14 (In open court, in the absence of the jury.)

15 THE COURT: The note that came in first reads:
16 "Judge Duffy:

17 "We are now," underlined, "ready to hear the
18 testimony on William Alonzo."

19 That will be marked as a Court's exhibit.

20 (Court Exhibit 97 marked for
21 identification.)

22 THE COURT: I have another note. I will take
23 care of this one now, but we have to think about this next
24 note, because I don't know what the answer to it is, but
25 I will read it to you.

1 p23

2 "We would like to know the following dates:

3 "1. Of the original indictment.

4 "2. Of the supplementary indictment."

5 I think they mean the superseding indictment.

6 "3. When Mr. Barnaba went to Mr. Tolopka's
7 house wired with the tape recorder."

8 I don't remember that date ever coming in.

9 MR. RICHMAN: It was May of 1973, your Honor.

10 MR. DOWD: It came out as May of 1973, Judge.

11 THE COURT: "4. The specific date when Mr.
12 Tolopka was indicted."

13 Mark this as a Court's exhibit.

14 (Court's Exhibit 98 marked for
15 identification.)

16 THE COURT: I think I might have in this record
17 more notes marked as Court's exhibits than I did of news-
18 paper articles marked as exhibits.

19 MR. ELLIS: Judge, am I correct there were three
20 indictments, one back in April, October --

21 THE COURT: That is what I want to talk about
22 after I get this testimony read to them, because they sound
23 like they are chomping at the bit. They don't realize how
4 24 long it takes to cull out this testimony.

25

xx

1 p24

4 2 MR. PANZER: Your Honor, I had made certain
3 objections with respect to this testimony with respect
4 to Hattie Ware. I don't think we have rulings on that.

5 THE COURT: Hold on for a second. Do you
6 recall what page that was on?

7 MR. PHILLIPS: 2193, I think.

8 MR. PANZER: Just up to there, your Honor?

9 THE COURT: Yes. I assume you are withdrawing
10 your objection?

11 MR. PANZER: Yes.

12 MR. SIEGEL: Your Honor, I am covering for Mr.
13 Pollak.

14 THE COURT: All right.

15 (Jury present.)

16 THE COURT: First of all, ladies and gentlemen,
17 let me apologize. I received your note stating that
18 you were now ready to hear the testimony on William Alonzo,
19 which is Court's Exhibit 97. I got that some minutes ago,
20 but the logistics of culling out of the record what would
21 be relevant and what would answer your question are pretty
22 difficult, so don't think I have been goofing off, it is
23 just that I have to get it lined up.

24 Mr. Reporter, would you be good enough to read
25 the indicated portions of the testimony.

1 tp25

2 (Page 2190, line 14, to page 2193, line 4;
3 page 2459, line 10, to page 2460, line 23; page
4 2464, line 6, to page 2465, line 12; page 2467,
5 line 12, to page 2472, line 14; page 2475, line 23,
6 to page 2476, line 3; and page 2571, line 1, to page
7 2577, line 19, were read to the jury.)

8 THE COURT: All right, ladies and gentlemen.
9 I realize I am running behind you with the notes, but I am
10 doing the best I can.

11 All right, Mr. Marsha.

12 (At 5.00 o'clock p.m., the jury returned to
13 the juryroom to continue to deliberate upon a
14 verdict.)

15 THE COURT: All right. Let us see if we can
16 get answers to 98 for identification.

17 The original indictment, does anyone know the
18 date offhand?

19 MR. PHILLIPS: If we are talking about the April
20 indictment, that was April 13, 1973.

21 The next indictment superseded that.

22 THE COURT: Go ahead.

23 MR. PHILLIPS: That was October 3, 1973.

24 The final indictment was December 6, 1973.

25 THE COURT: All right.

1 tp26

2 MR. RICHMAN: Your Honor, I am not really con-
3 cerned with the April indictment as it did not concern --
4 withdrawn.

5 THE COURT: The last, the December 6, 1973,
6 was the indictment in which it named the defendant Tolopka,
7 is that correct?

8 MR. PHILLIPS: Yes.

9 MR. RICHMAN: That's correct, your Honor.

10 THE COURT: Mr. Barnaba went to Tolopka's house
11 somebody told me in May of 1973.

12 MR. RICHMAN: May of '73 wired up.

13 THE COURT: All right. Would anybody be good
14 enough to walk inside while working on the other note and
15 just tell me the page?

16 MR. CURRAN: Page 1621, your Honor.

17 (At 5.55 p.m., a note was received from the
18 jury.)

19 THE COURT: Mr. Clerk, will you mark this note.

20 (Court Exhibit 99 marked for
21 identification.)

22 THE COURT: I heard someone say while the clerk
23 was marking the exhibit, "What time is dinner?"

24 I have arranged for the jury to go to Stark's,
25 which is on Broadway. That is off limits to everybody

1 tp27

2 tonight. They will be going there at 6.30.

3 I received a note which was marked Court's
4 Exhibit 99 for identification which says:

5 "Please tell us on what dates the following men
6 were arrested:

7 "Harry Pannirello, Jimmy Pannirello."

8 I believe that means John Pannirello. There is
9 no Jimmy Pannirello in this case, to the best of my know-
10 ledge.

11 MR. POLLAK: Jim Provitera.

12 THE COURT: He is next.

13 "Jimmy Provitera and John Barnaba."

14 I think that those items are in the record.

15 MR. FISHER: Yes.

16 MR. LOPEZ: Yes.

17 MR. RICHMAN: Your Honor, Barnaba is November 14,
18 1972.

19 THE COURT: Do you have the page citation, Mr.
20 Richman?

21 MR. DOWD: Your Honor, it is somewhere in his
22 cross-examination where reference was made to the date of
23 the tape in Rogers' office, which is dated November 14th,
24 I believe.

25 THE COURT: Does anyone have any objection to me

1 tp28

2 telling the jury the four dates if I can find the four dates
3 in the record?

4 MR. LOPEZ: No, not at all.

5 THE COURT: All right.

6 MR. CURRAN: No, your Honor.

7 THE COURT: We received another note before this
8 about asking for the date of the original indictment, then
9 the supplementary indictment, which I believe is the super-
10 seding indictment, then the date that Barnaba went to
11 Tolopka's house wired up and what date Tolopka was in-
12 dicted.

13 I think perhaps the people might like to be heard
14 on this. Mr. Curran, would you --

15 MR. CURRAN: Your Honor, with respect to all
16 the questions, we have no objection to the dates of all three
17 indictments being told to the jury, and I think we have
18 agreed that May, 1973, is the response to the other question
19 asked by the jury. The specific date of Tolopka's indictment,
20 as I understand it, is December 6, 1973, or the date of the
21 third of the three indictments.

22 If your Honor decides to give that information
23 to the jury, we have no objection, we are entirely in your
24 Honor's hands.

25 However, if your Honor is giving the information,

1 tp29

2 we would ask your Honor to instruct the jury that just as
3 in the case of the indictments themselves, the dates of
4 the indictments are not evidence.

5 THE COURT: Go ahead.

6 MR. RICHMAN: Your Honor, I believe the jury
7 asked only for the dates.

8 THE COURT: That's right.

9 MR. RICHMAN: They are in evidence. I think
10 they should be given as is, without any instructions
11 limiting them in any fashion.

12 THE COURT: Wait a second. They are not in
13 evidence and unless the government consents to it, Mr.
14 Richman, I will tell them only the date of the second super-
15 seding indictment, but they have consented. That is the
16 only indictment that they are concerned with. Nothing else,
17 nothing else is in the record.

18 MR. RICHMAN: I beg to differ with your Honor.

19 THE COURT: The government has indicated they
20 are willing to give the dates. Don't fight it.

21 MR. RICHMAN: Okay.

22 MR. CURRAN: Your Honor, if the dates of the
23 indictments are not in evidence --I had assumed that they
24 were, but if the dates of the indictments are not in
25 evidence, it is the government's position they should not

1 tp30

2 be given to the jury.

3 THE COURT: You just said they should be.

4 MR. CURRAN: I said I had no objection to it,
5 your Honor, I said I was entirely in your Honor's hands
6 on that point. I was assuming, based upon what has been
7 said, that the dates appear in the record before the jury.

8 THE COURT: I don't know if they do or they
9 don't. I am at a total loss.

10 How many pages are in this record at this point?

11 MR. CURRAN: Over 5000, your Honor.

12 THE COURT: All right. Could you gentlemen
13 work out a stipulation as to the four dates of Harry
14 Pannirello, I believe it should be John Pannirello and not
15 Jimmy, Jimmy Provitera and John Barnaba?

16 To the best of my recollection, it is November,
17 1972, for Barnaba and February 3, 1973, for all the others,
18 although I think there was a break of two days there,
19 February 3rd and February 4th.

20 MR. CURRAN: Your Honor, I believe --

21 MR. PANZER: February 2nd.

22 MR. CURRAN: I believe Provitera was arrested on
23 the evening of February 3, 1973, and that the two Panni-
24 rellos were arrested on February 4, 1973.

25 I think we are already in agreement that John

1 tp31

2 Barnaba was arrested on November 14, 1972.

3 These dates, your Honor, I am quite certain are
4 in the record.

5 THE COURT: All right.

6 MR. LOPEZ: Were are in agreement as far as
7 those dates go.

8 THE COURT: All right.

9 (Pause.)

5 10 THE COURT: Mark this note as the next Court's
11 exhibit.

xx 12 (Court Exhibit 100 marked for
13 identification.)

14 THE COURT: Court's Exhibit No. 100 reads:

15 "To Judge Duffy: 5.50 P.M.

16 "We are ready for the summations requested
17 re Count 21.

18 "Lucy Hare, Forelady."

19 I am going to have them out. I am going to give
20 them the dates of the arrests of the four witnesses. I am
21 also going to give them the dates of the original indict-
22 ment, superseding indictment, and so on, and explain to
23 them that the dates of the indictments and superseding
24 indictment are merely the dates when accusations were made
25 and not evidence in this case.

1 tp32

2 All right, bring back the jury.

3 (Jury present.)

4 THE COURT: Ladies and gentlemen, you asked me
5 for the dates, "Please tell me on what dates the following
6 men were arrested:

7 "Harry Pannirello."

8 Harry Pannirello was arrested was February 4,
9 1973.

10 You then list Jimmy Pannirello, and I think
11 you mean John Pannirello. John Pannirello was arrested
12 February 4, 1973.

13 Jimmy Provitera was arrested on February 3,
14 1973.

15 John Barnaba was arrested on November 14,
16 1972.

17 You asked for the dates of the indictments.
18 I am going to tell you now that the dates of the indict-
19 ment --

20 THE FORELADY: Did you say Barnaba was '72
21 or '73, your Honor?

22 THE COURT: That was November 14, 1972.

23 THE FORELADY: Thank you.

24 THE COURT: As for the dates of the indictments,
25 those dates of the indictments and the superseding indict-

1 tp33

2 ment are merely the dates when accusations were made. Just
3 like the indictments, they are not evidence.

4 The original indictment was filed April 13,
5 1973, the first superseding indictment was filed October 3,
6 1973, the second superseding indictment was filed December
7 6, 1973.

8 You asked which indictment the defendant Tolopka
9 was named in and it was the last one, December 6, 1973.

10 You asked when Mr. Barnaba went to Tolopka's
11 house when he was wired up. That date is in or about
12 May, 1973. There is no exact date.

13 All right. You indicated that you would like
14 sections of the summations read in connection with Count
15 21. The logistics of this are extremely difficult and
16 please be patient with me. I am not quite clear yet as to
17 where we are going to come on that one.

18 As perhaps you know, or maybe you don't know,
19 we have made arrangements for you to go to dinner over at
20 Stark's Restaurant. I think you have been there before.
21 All right.

22 (At 6.10 p.m., the jury returned to the juryroom
23 to continue to deliberate upon a verdict.)

24 THE COURT: Mr. Lopez and Mr. Curran, would
25 you come inside with me, please.

1 tp34

2 (At 8.35 p.m., in open court, in the absence
3 of the jury.)

4 THE COURT: I received a request before to read
5 the summation of counsel on Count 21. I have gone through
6 the summations of those suggested to me as to Count 21.
7 There is less than one page involved in the count directly
8 and that comes from you, Mr. Lopez. Mr. Curran's summation
9 did not go through the evidence count by count.

10 Under the circumstances, I feel that
11 I am going to refuse the jury's request to read the sum-
12 mation. I wanted to write out exactly what I was going to
13 say so that you will know before I say it.

14 Ladies and gentlemen, I have gone through the
15 various summations looking for argument of counsel on
16 Count 21 which you asked for.

17 There is only one summation which touches on
18 this question, and there for less than one full page.
19 Needless to say, it gives only one point of view.

20 Under the circumstances, I feel it unfair for
21 any summations on this count to be read to you, and I must,
22 therefore, refuse your request.

23 MR. LOPEZ: May I be heard, your Honor?

24 THE COURT: Yes.

25 MR. LOPEZ: Your Honor, I would except to your

1 tp35

2 Honor's ruling in this matter and I would respectfully
3 request that your Honor leave it up to the jury whether
4 or not they would like to hear one summation.

5 Certainly they have asked for both. I feel
6 that the government has not been precluded from arguing on
7 this point if they wanted to. I understand what their
8 problem was. Nevertheless, I also understand that of
9 Di Napoli. And I feel that the option of hearing one
10 summation, if that is what they want, should be left to
11 them and I would ask that the message be phrased in those
12 terms.

13 This is in view of the fact that yesterday,
14 your Honor, we took the position with the jury --

15 THE COURT: Yes, I understand. I am aware of
16 what happened yesterday.

17 No, under the circumstances I am going to
18 deny it.

19 All right, Mr. Clerk, bring back the jury.

20 MR. LOPEZ: Your Honor, Mr. Fisher wishes to
21 address the Court for one moment.

22 (Pause.)

23 MR. LOPEZ: Your Honor, the suggestion has been
24 made to me, your Honor, and I think it has been well taken,
25 if your Honor would indicate that one summation dealt with

1 tp36

2 the point rather than delineating it as one page. If that
3 could be eradicated from the message --

4 THE COURT: As I said, there is only one.
5 summation which touches on this question.

6 MR. LOPEZ: And my request is that we eliminate
7 the fact that that summation involves one page. I think
8 there is reference in the Court's --

9 THE COURT: And there for less than one full
10 page.

11 MR. LOPEZ: "And there for less than one full
12 page" I would ask, your Honor, that at least that be
13 deleted.

14 We are not saying which summation dealt with
15 the problem.

16 Do you want me to rewrite the note?

17 THE COURT: No, I am going to bring them out and
18 read it to them.

19 All right.

20 MR. PANZER: Your Honor, I may be anticipating
21 a problem, but I think we ought to consider it.

22 I wouldn't want the jury to take this particular
23 note and feel that they couldn't ask for any of the sum-
24 mations if that were the case and I think --

25 THE COURT: I don't think it gives that impres-

1 tp37

2 sion at all. I am not sending a note to them, I am going
3 to read it to them. I don't think it conveys that impres-
4 sion at all.

5 MR. PANZER: All right.

6 THE COURT: I will tell you what, Mr. Panzer,
7 suppose I add this, "If there is anything else you wish,
8 however, I will be glad to consider your request and
9 furnish it to you."

10 MR. PANZER: I would ask if your Honor says if
11 there are any other summations pertaining to any other
12 areas you wish to hear, I will consider it.

13 THE COURT: No. I am going to stick to if there
14 is anything else you want, which is quite clear.

15 MR. RICHMAN: Your Honor, do we have any other
16 open notes from the jury?

17 THE COURT: No.

18 MR. RICHMAN: That is it?

19 THE COURT: Yes.

20 MR. POLLAK: What about the Forbrick note?

21 THE COURT: Give them a chance, Mr. Richman.
22 They have only been back for five minutes.

23 (Jury present.)

24 THE COURT: Ladies and gentlemen, I have gone
25 through the various summations looking for the argument

1 tp38

2 of counsel on Count 21 which you have asked for.

3 There is only one summation which touches on
4 the point. Needless to say, it gives only one point of
5 view.

6 Under the circumstances, I feel that it is unfair
7 for any summations on this count to be read to you and,
8 therefore, I must refuse your request.

9 If there is any other matter which you want,
10 however, I will be glad to consider it and do my best to
11 comply with the request.

12 I am sorry I must refuse this one, but I feel I
13 must.

14 All right.

15 THE FORELADY: Thank you.

16 (At 8.40 p.m., the jury returned to the juryroom
17 to continue to deliberate upon a verdict.)

18 THE COURT: All right. Please don't wander too
19 far away. I don't know what is going to happen. I gave up
20 on prophesizing what juries would do when I discovered I
21 just didn't have the talent.

22 (At 9.20 p.m., a note was received from the
23 jury.)

24 THE COURT: We are now up to Exhibit 101.
25

tp39

xx

(Court Exhibit 101 was marked for identification.)

THE COURT: "Dear Judge Duffy:

"Can we consider testimony regarding conspiracy as corroborative evidence on a substantive charge? Rather than calling us into court, we would appreciate it if you could answer us in writing."

MR. DOWD: Would you repeat it, Judge?

THE COURT: Yes.

"Can we consider testimony regarding conspiracy as corroborative evidence on a substantive charge? Rather than calling us into court, we would appreciate it if you could answer us in writing."

MR. ELLIS: Judge, I think that requires repeating the entire charge.

MRS. ROSNER: May we have a few minutes to draft a reply?

THE COURT: Yes. I would suggest that a complete answer might take a couple of years, but if you want to take -- do you want to be heard?

MR. CURRAN: Yes, your Honor. I think the answer is a very simple one. I think the answer is yes.

1 tp40

2 THE COURT: I am willing to give the defense
3 counsel a couple of minutes to see what they can do.

4 MR. CURRAN: That is the government's
5 position.

6 THE COURT: We understand that.

7 I am going to give you -- you said a couple of
8 minutes? How about fifteen?

9 MR. ROSENBERG: Judge, if his answer is yes,
10 our's is no. We don't need a couple of minutes.

11 THE COURT: Think about it.

12 MR. DOWD: Can we have the note, Judge? I don't
13 understand it yet.

14 THE COURT: Do you want to make notes on it?
15 I will read it to you again.

16 MR. DOWD: Once more.

17 THE COURT: All right.

18 MR. SIEGEL: Your Honor, was that signed by the
19 Forelady?

20 THE COURT: No.

21 MR. POLLAK: Who is it by?

22 THE COURT: "Dear Judge Duffy:

23 "Can we consider testimony regarding con-
24 spiracy on corroborative evidence on a substantive
25 charge?"

1 tp41

2 MR. PHILLIPS: Do they say "or" or "as"?

3 THE COURT: As corroborative evidence.

4 "Rather than calling us into court, we would
5 appreciate it if you could answer us in writing."

6 Do you want to know who signed it?

7 MR. DOWD: Yes.

8 THE COURT: "Sincerely, Hazel Hayman." That
9 is Juror No. 7.

10 Take 15 minutes and I will see what you have.

11 (At 9.35 p.m., a note was received from the
12 jury.)

13 (Court Exhibits 102 and 103, respectively,
14 marked for identification.)

15 THE COURT: 102 for identification reads:

16 "To Judge Duffy:

17 "We would like to receive the following:

18 "1. The summation remarks of the prosecuting
19 attorney.

20 "2. The summation remarks of the defense
21 attorney.

22 "3. The summary remarks of the Judge regarding
23 Benjamin Tolopka."

24 103 for identification:

25 "We would like to hear the testimony of Barnaba

xx

1 tp42

2 about Tolopka and the testimony of Tolopka's witnesses
3 on offense."

4 I assume that is defense witnesses.

5 MR. DOWD: Your Honor, if I may?

6 THE COURT: Yes, go ahead.

7 MR. DOWD: I was going to make a suggestion.

8 Based at least on those last notes I would think
9 that in regard to the testimony, it wouldn't be the best
10 idea, perhaps, to break it up. It would seem that should
11 take quite a long time to read that back, and perhaps that
12 would be better left for tomorrow morning.

13 THE COURT: I don't know. I have to take a look
14 at it. I am going to take a look. I figure you are
15 entitled to know what the notes are as soon as I do, so I
16 just walked out.

17 You might think about what the summation remarks
18 of the prosecuting attorney are, and I assume that the
19 entire summation of Mr. Richman would be the answer to the
20 second one, and I am going to have to go look at the
21 summary of the evidence that I did. That is going to be
22 a fairly monumental task.

23 Mrs. Rosner, you indicated you had something
24 else?

25 MRS. ROSNER: Yes, your Honor.

1 tp43

2 "Concerning Exhibit 101, Mrs. Hayman, we have
3 received your note.

4 "Your question is not susceptible to a simple
5 general answer. It would be helpful if you could
6 phrase your question in terms of the problem you
7 are considering."

8 We would suggest answering it in that fashion,
9 your Honor, for the following reasons:

10 The purpose of this kind of communication
11 between the Court and jury is to be instructive
12 and helpful to the jurors in their deliberations.
13 The question is so amorphous, it is so undirected that you
14 really can't be positive what it is they are getting at.
15 If they have a serious problem, your Honor, I think we
16 ought to help them, if possible, to define what information
17 it is they are seeking.

18 For instance, this afternoon they came in and
19 wasted an hour of their time and ours getting a charge on
20 circumstantial evidence when what the jury was seeking to
21 get was a charge on the meaning of hearsay. So I think
22 rather than waste more time --

23 THE COURT: That was this morning.

24 MRS. ROSNER: This morning, right.

25 Rather than wasting more time in drawing up

1 tp44

2 complex answers to various simple questions which may be
3 the creation of error when none exists, the simplest
4 solution would be to ask them what they are talking about.

5 MR. FISHER: I object to the part "where none
6 now exists," your Honor. I am sure upon reflection Mrs.
7 Rosner would like to withdraw that herself.

8 THE COURT: No, it will stand.

9 MR. SIEGEL: Your Honor, can I make inquiry of
10 who signed notes 102 and 103?

11 THE COURT: 103 is unsigned, 102 is signed "Lucy
12 Hare, Forelady."

13 MR. DOWD: Your Honor, I would just like to be
14 heard, too.

15 THE COURT: Yes.

16 MR. DOWD: I think that any answer which would
17 be in more specific language would be extraordinarily
18 dangerous in a case this large with this many defendants
19 and this much evidence heard, because the thing that I
20 think everyone worries about in a case like this is just
21 that the volume of evidence is so monumental that it can
22 be overwhelming and I think that we all, obviously the
23 defendants in particular, are concerned with that and to
24 answer a question like that as to what would corroborate
25 evidence with respect to the substantive counts is a very,

1 tp45

2 very complex, sophisticated question and I say it is very,
3 very dangerous in terms of answering any more specifically
4 at this time.

5 THE COURT: All right. I hear your argument.
6 I might have an answer for it.

7 MR. CURRAN: Your Honor, it seems to the govern-
8 ment that it is not for us to pass upon, to paraphrase Mrs.
9 Rosner, what the jury is getting at. The jury has asked
10 a very specific question in Court Exhibit 101 and I really
11 think there is one very specific answer and I didn't mean
12 to be facetious at all. I think the answer is very clearly
13 yes, and I think that is all the answer that is needed.

14 I don't think you should respond to the jury
15 by asking a jury your question, which has been suggested.

16 MR. ELLIS: Your Honor, I agree with Mr. Dowd
17 and Mrs. Rosner, it would be exceedingly dangerous to try
18 to answer a hypothetical question when we don't know the
19 count that it relates to and the evidence that they consider
20 corroborative of the evidence adduced in support of that
21 count.

22 We need some factual framework to answer this
23 question. We just can't answer it out of the air, out of
24 whole cloth. The obvious perils of that, I would say,
25 are too great to not ask that follow-up question, "What

1 tp46

2 are you talking about?"

3 MR. FISHER: Your Honor, I would think that the
4 answer in any event could never be "Yes." I think that is
5 because ultimately what corroborates what is a question of
6 fact, not one of law, and that is solely the province of
7 the jury, your Honor.

8 MR. PANZER: Your Honor, may I just be heard
9 briefly?

10 THE COURT: Yes.

11 MR. PANZER: I think the note reflects a Pinkerton
12 problem where they ask whether the conspiracy corroborates
13 some of the substantive acts. Your Honor did not charge
14 that in its charge and I think we are restricted to that
15 and I think the answer to that note is a plain no. I don't
16 see any other way of getting around it.

17 THE COURT: No one ever bothers to read the
18 record in the Pinkerton case. The Judge there never
19 charged it, either. I don't know why people believe you
20 have to charge it at all.

21 All right. Do you want to be heard?

22 MR. CURRAN: No, your Honor.

23 THE COURT: All right.

24 This note doesn't make any sense and what I have
25 to do is go back and read the other notes to see if it does

1 tp47

2 make any sense, so that is what I am going to do right now.

3 MR. POLLAK: Could you read us the note, your
4 Honor? Perhaps we can help you.

5 THE COURT: Let me toss out one other thought.
6 Has anyone thought of taking partial verdicts,
7 besides me?

8 MRS. ROSNER: I would object to it strenuously.

9 MR. FISHER: I would object to it.

10 MRS. ROSNER: Absolutely.

11 MR. DOWD: I would object to it.

12 MR. PHILLIPS: I would object to it.

13 MR. FISHER: Certainly in the absence of any
14 request on the part of the jury sue sponti, I don't think
15 it would be appropriate to suggest it to them at this
16 point, your Honor.

17 THE COURT: Your position?

18 MR. CURRAN: The government takes the same
19 position, your Honor.

20 MR. FISHER: I must have made a mistake, your
21 Honor.

22 (At 10.00 o'clock p.m., in open court,
23 in the absence of the jury.)

24 THE COURT: We will mark this note Court's
25 Exhibit 104 for identification.

1 tp48

2 (Court's Exhibit 104 was marked for
3 identification.)

4 THE COURT: Remember, we started off with notes
5 on Court's Exhibit 77.

6 This one reads:

7 "Judge Duffy:

8 "Please cancel any request for testimony
9 and/or information re Joe Di Napoli."

10 I went back and checked. I thought we gave them
11 everything except the summations. I don't know what it
12 means.

13 MR. FISHER: The corroboration question.

14 THE COURT: My problem is --

15 MR. LOPEZ: Excuse me, your Honor, did they say
16 Joe Di Napoli?

17 THE COURT: Yes, Joe.

18 The request for the Barnaba testimony on Tolopka,
19 the Tolopka witnesses and so on and so forth will run,
20 minus summation -- I heard the estimate, first of all, of
21 defense counsel, I heard the estimate of government counsel
22 and now I am going to come out with my estimate since theirs
23 is substantially less than mine. I figure about four hours.
24 It is about a day and a quarter of the defense case by Mr.
25 Richman, there is about 55 minutes of summation by Mr.

1 tp49

2 Richman, there is about 10 to 20 minutes maybe of summation
3 by Mr. Curran and then we are going to go through that
4 thing that took us two hours to read the other day on
5 Tolopka again.

6 I don't know if you fellows can take the grind
7 of sitting here for another four or four and a half hours.

8 MR. DOWD: No, Judge.

9 THE COURT: But I will tell you, I am bone tired
10 and I am not going to do it tonight. I am going to go in
11 and tell the jury that we will take care of their requests
12 tomorrow and we think that they ought to go and have a
13 good night's sleep.

14 Does anyone object?

15 MR. DOWD: No, Judge.

16 MRS. ROSNER: No, your Honor.

17 MR. LOPEZ: No, your Honor.

18 MR. POLLAK: The only thing is with respect to
19 the request which the government says should be answered
20 yes, Exhibit 101, I think they should now be asked whether
21 that referred to Mr. Di Napoli.

22 THE COURT: I will tell you what, let me sleep
23 on it before I do anything about that, because it might
24 refer to somebody else. I don't want to go in and say,
25 "Does this refer to the defendant Joe Di Napoli?"

1 tp50

2 Just let me sleep on it. All right. Good
3 night, ladies and gentlemen.

4 MR. DOWD: What time tomorrow morning?

5 THE COURT: 10 o'clock.

6 (Adjourned to Tuesday, March 12, 1974,
7 at 10.00 A.M.)
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25